GROUP DEFAMATION

Submissions to the Attorney General of Ontario

Patrick D. Lawlor, Q. C.

March 1984

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The Minister of Justice and Attorney General of Ontario

Re: Group Defamation

PREFACE

This report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point at where the intolerable and the impermissable coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighed heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal crossfire that goes beyond legitimate debate.

An effort is made here to reexamine, therefore, the perimeters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as facts and conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults -- the non-facts and the non-truths of prejudice and slander.

Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.[1]

[1] Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada

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PART I

OPENING REMARKS

In September, 1983, the Minister of Justice and Attorney General of Ontario asked me to submit a written study and analysis of possible legislation and other responses to the problem of group defamation, to attempt to clarify the legal and social issues involved, and to define, if that were possible, the various legislative and non-legislative alternatives open to the Provincial Government, together with their advantages or disadvantages. Like any problem pertinent to contemporary government, the task could not be easy: the complexities and obstacles to framing a positive and intelligent response to a great social evil written within our democratic system were and remain formidable. However, it is a worthy challenge and herewith I submit not so much a "report" as a study. It is a study because its primary concern is not with procedures, legal mechanisms, or external reforms. It is not a technical study though it does not neglect what might be done, rather it deals with policy and principle. What is at stake is inherent human dignity, wherein, if all our citizens are not accorded the treatment of equals,[1] the centre falls apart.

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[1] See Ronald Dworkin, Taking Rights Seriously, Harvard University Press (1977) Chapter 7 and Chapter 11: "Liberty and Liberalism".

Therefore, although I spoke to many groups and individuals to gain necessary background information and to test informed opinions on possible alternatives, I conducted no exhaustive research into present instances of the problem. Besides this has been done again and again; the persisting difficulties continue to fester and are only too well known.

Again I shall address the question of the role and utility of "law" as a legitimate or illegitimate instrument in this area of social conflict elsewhere in this submission, letting it be said, from the outset, that I hold it to be not only legitimate but in principle necessary.

I do not advocate the banning of hate-mongering groups as such, as the United Nations calls for, and not just because the provincial government probably has not the power to do so.

At this beginning, I surmise that the focal point of the research might be on notions of "superiority" -- superior races. Some jurisdictions have legislated in part by this route, but while not in any way discounting this approach, still it seemed more to the point to place the primary emphasis on the core, namely, vilification or discrimination per se, based on racial and religious hatred.

True, under and through the recommendations of the Cohen Commission (Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada) of 1965 whose Preface I have incorporated into this Report, the Criminal Code was amended, firstly, to bring Canada within the terms of several United Nations conventions, particularly with regard to genocide and the propagation of racial superiorities or racial hatreds in the world; and then, more centrally, to address the persistent domestic disease. No one, on grounds of legitimate free speech or any other rationale, can possibly take issue with penal or other legislation against the advocacy of genocide; that, surely, must be one form of speech or conduct that, on any civilized norm, must be abrogated ab initio. It is hatred with a vengence; but other discriminations lead to and foster it, although other considerations and discriminations also obtain which we shall bring forward.

But the Criminal Code provisions (Section 281), in practice, have been seen by various provincial attorneys general and many interested others, as fallible, deficient or inadequate in actual application because of the heavy onus of proof placed on the Crown and the numerous almost insuperable defences erected, largely to protect one conception of freedom of expression. Presently, the sections in question are under surveillance in Ottawa,

with an eye to possible amendment. In any event, the use of the criminal law may not be the only or the best instrument in all circumstances to confront or redress the evil; particularly because criminal sanction may, in context, be a sledge hammer (although racial or religious vilification is seldom a fly); and secondarily, because a civil mode of dealing with the problem may well have more point and efficacy, depending on the nature of the case. Neither need be ruled out -- either might be an "answer". In numerous instances under our law, they have been taken to supplement one another, rather than as contradictories.

We, all of us, however saintly or blank we may be, knowingly or mostly ignorantly, entertain and nurture numerous animuses and prejudices, including usually some racial virus or another. Usually we are not rabid, nor the passion virulent; still it lurks just beneath the skin and in certain circumstances social or economic, tends to erupt in periodic lunacies. We are not overly willing to admit that even to ourselves. Law, besides its punitive and deterrent functions, which are most stressed in our society, has more importantly an instructive, developmental and socializing function in setting criteria and a code of conduct for what is and becomes acceptable civil behaviour; as Plato said, law basically has a primarily

pedagogic function not a punishing one.[1] The always present, waxing and waning, sore of social and religious malice need not, and should not, wait upon a virulent outbreak, upon a "clear and present danger", by a so-called benign neglect reaching toward condonation, before timely action is taken. We need not be, nor does the Law need to be, so complacent or indulgent as to adopt a prime test of physical violence or give the appearance of, at least, implicit approval until something irreparable happens. The target group of potential or intended victims is on its side entitled to protection, not only against actual physical violence, but against calumny, fear and threat which infects and diminishes their lives.

Nor can, nor will I, argue that the law is the whole answer. A new institutional -- social openness is necessary to which law can materially contribute; a recognition that the reaction of the victim has political as well as social dimensions in terms of avenues to participation and distributions of wealth.

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1 For instance in an article in Chitty's Law Journal in 1967, page 302, the Honourable Mark MacGuigan cited the effect on the attitude of southern white parents on sending their children to schools with coloured children. In the 1963 poll 61% opposed. with only 38% in favour. "But in the space of just two years a dramatic change took place under the impact of the new law -- or at least, the new implementation of the old law and a 1965 poll found that only 37% opposed school integration and 62% would accept it."

We might also be reminded that our culture has nurtured historically an ethnocentric white bias, which devalues those of other peoples, many of which stress and live precious truths relatively unknown to us. However that may be, almost as hurtful as overt attacks upon minorities, is their perception that their fellows do not care; that they are abandoned to their fate; that no protection is forthcoming from their own government.

In this area, as in so many others, in matters of race and religion and in group relationships, the nostrums of yesterday make little sense. Speaking of class actions and the prejudice in our law against group proceedings generally, the Law Reform Commmission stigmatizes an excessive individualism as follows:

> To a considerable extent however this perspective of our place in society is today somewhat outdated -- an anachronism often more a reflection of nostalgia than reality. Individual notions of our capacity to assert and protect our legal rights by acting alone were, of course never entirely in accordance with the often harsh facts. Moreover, it is hardly revolutionary to suggest that we have never had such comprehensive legal protection as we enjoy today. But the mere cataloguing of legal rights reveals only one part of the story, and masks another. Social, economic, political, and other changes in our society -- telescoped as they have been into a brief period of time -- have radically affected our ability to pursue our goals in isolation.
>
> Not surprisingly, it is the development of a highly complex, interdependent society that has impeded the capacity of each person to vindicate his legal rights. No longer are we faced with

> only a single individual or small business against whom we have some grievance. Trite as the observation necessarily is, it bears emphasizing that we live in a corporate society, characterised by mass manufacturing, mass promotion, and mass consumption. The production and dissemination of goods and services are now largely the concern of major corporations, international conglomerates, and big Government, whose many and diverse activities necessarily affect large numbers of persons in virtually all aspects of their lives. Inevitably, dramatic changes in production, promotion and consumption have given rise to what may be called "mass wrong" -- that is, injury or damage to many persons caused by the same or very similar sets of circumstances.[1]

Freedom becomes a fetish where bitter unfreedoms are inflicted upon innocent and vulnerable others. Instead of being an instrument or means of liberation from numerous denials and oppressions -- a way to truth and mercy -- it becomes an excuse to do nothing.

Dhiru Patel catches a prevalent minatory attitude as "pretentious make-believe that Canada (or Ontario) is free of racism and racial problems that plague other countries".

Kenneth McNaught, in his work entitled "Violence in Canadian History in Character and Circumstance: Essay in Honour of Donald Grant Creighton" (1970) tells us, "If our

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[1] See Report on Class Actions, Ontario Law Reform Commission Volume 1, page 3.

Canadian history teaches us anything, it is that racist doctrine contains more potential violence than any other social political notion".

If our vaunted policies on multi-culturalism are to amount to much, this issue must be dealt with forthrightly and frontally, not by the "knee-jerk reaction" Patel talks about, "The present ad hoc 'fire brigade' approach will not be sufficient to stem the tide; we may be already locking ourselves into the unhappy and futile process of merely reacting in the knee-jerk fashion instead of preventing, of doing too little too late instead of anticipating and ensuring the problems do not occur"[1], and not by law alone, but through structural changes wherein law has an essential place.

Finally, we live in a mass age. Under both heads of our Study, Defamation and Groups, the impact, for good or evil, of contemporary technology has to be taken into account. "The readiness with which millions can be reached with messages of every kind is a changed circumstance of importance. Radio, television, motion pictures, and the pervasiveness of print are new elements in the twentieth

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1 Dhiru Patel, "Dealing with Interracial Conflict: Policy Alternatives", page 40.

century which the classic supporters of free speech never had to reckon with".

This study has been divided into seven parts as follows:

Part I	Opening Remarks
Part II	Difficulties and Problems
Part III	Presuppositions
Part IV	Existing Legislation
Part V	Positive Proposals
Part VI	Class Actions and Wording
Part VII	Final Remarks

PART II

DIFFICULTIES AND PROBLEMS

It may be as well to outline some of the problems for we shall never get even approximately the right answers unless and until we ask the right questions.

Let me tell you the problems are formidable, and at first sight -- and may be the last one -- possibly insuperable, although to raise your spirits, I do not think so.

First, they are constitutional; secondly, philosophical, that is, having to do with freedom and natures; thirdly, psychological, that is concerning our attitudes and root drives and the gyrations of human nature, particularly as to the impact and meaning of law upon them. On this last point, let me say that I am neither a liberal -- I do not think one assessment of the human condition as wise as another, nor that goodness typifies that condition, nor does rationality -- nor am I a conservative -- I hold human possibility slightly higher than Edmund Burke. Fourthly, there is a host of legal conundrums.

Section 1: Constitutional

In unitary states, constitutions present trying problems in terms of interpretation and administration; they know

little of the toils of federal systems. The British North America Act is not only no exception but offers exceptional complexities.

1. "Property and Civil Rights" are supposedly a provincial category of power and legislative authority. However, an earlier interpretation of the "peace, order and good government clause (POGG)", the preamble of the section on exclusive federal jurisdiction (S.91), has been held to govern general civil liberties.[1]

2. More to the point now, Section 91(27) acts as an almost absolute prohibition or restriction on any provincial legislation of a criminal nature or colour. A statute, which in terms of wording and intent, having to do with incitement to racial hatred, on the books of the Province of Manitoba since 1934 has been left useless for almost 40 years. It has recently been invalidated, because it does trench upon the federal criminal power which is deemed not just paramount but exclusive. If violence is to be counteracted, if the public peace is at stake in terms of riots or assaults or seditions or blasphemies, or obscenities, either in fact or prospectively,

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1 Saumur v. Quebec (City) [1953] 2 S.C.R. 299, 106 C.C.C. 289. (But see, in modification, page 37 and 38.)

either intentioned, conspired about, or as "likely to give rise to civil strife", then any provincial legislation which impinges upon that area, will be either moot or almost certainly ultra vires. Certainly, the provinces retain what is called a quasi-criminal legislating function, but this has application only in areas which are clearly deemed to be within designated provincial jurisdiction.

The range of the federal criminal law constitutes a vast and rolling territory, which I shall only advert to at this point. These potencies have been surveyed, weighed and investigated many times, more latterly, and with commendable skill, in the Cohen Report of 1965, to which I refer the interested reader and which will be found succinctly dealt with in Part IV on existing legislation.

3. The present hate propaganda provisions of the Criminal Code of 1970, which sections followed upon the 1965 Cohen Study, is a concerted attempt to deal with vituperative attacks on religious and racial groups. It has not proven effective.[1] We will return to its merits and demerits, which are considerable at a later page; here it is enough to state that, as originally envisaged, it

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1 See page 35 re Buzzanga and Durocher.

appeared to be a largely acceptable solution to the problem, although vigorously opposed by many civil libertarians.

4. The concept or conception of freedom of expression is the prime difficulty. We are "free" (as old Epictetus once said) to think what we will or like; we, I suppose, may righteously claim, like Archie Bunker, a right to be prejudiced (an infantile state of mind); no one knows (not even ourselves often) the hatreds we harbour in ourselves and no civil law can enter there. Still, in social terms, our overt acts or externalizations or many of them -- those of a malicious nature which affect the lives of others injuriously -- constitute the bulk of the offences under the Criminal Code and much provincial legislation such as civil liberties and the Libel and Slander Acts. Everyone, except the odd anarchist, concedes that rights even while not relational to times and civilizations are nevertheless not absolutes,[1] nor are they abstractions.

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[1] Article 29 of the Universal Declaration of Human Rights (December 1948) reads:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Only persons are sacred; our rights, the right to freedom of expression, as has been said earlier, bear conditions and connote responsibilities, and neither legitimize malice or license, nor permit subversions under the guise of their assertion. Freedom of speech is not a Trojan Horse. There are and must be, for civil peace, limitations upon it; and the question concerns, what are those limitations?

What would be a defamation on an individual under the Libel and Slander Act of Ontario, would not, except under a very narrow application, be actionable if propagated against a group. Surely this is a curious anomaly in our civil law explicable only on historical and procedural grounds. To say that "all lawyers are thieves" is clearly not actionable in that no particular lawyer has been indicated. To say that "all black lawyers in Toronto are thieves" very well may be actionable if there were only a few black lawyers. Of course the pertinent type of damage must be proven. So problems appear within solutions and we shall give further attention to this aspect under Part V (Positive Proposals).

Section 2: Philosophical

Freedom is not solely an individual affair. It connotes

responsibilities not just to myself, but since the self exists and only exists for its development and nurture in a world of others, who either oppose or assist me it almost invariably involves those others. And their opposition is not wholly negative for it often is a positive condition of testing and experiment and growth, while the assistance may, in circumstances, often be a stunting factor, if excessive or insistent. These things are not simple, as are the shibboleths upon which our political destinies seem daily based.

Freedom is and must be restricted in order to preserve freedom itself and the equal freedom of others; and further, on the ground of justice as in Adam Smith and Mill, that is, the individual should be restricted from exercising his freedom to the injury or detriment of other members of his society; and thirdly, on an appeal to equity in society itself, either on the grounds of utility[1] as contributing to the greatest general good (which is a weak ground) or on deontological grounds, having to do with the equal dignity and integrity of

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1 Mortimer Adler, The Idea of Freedom (Doubleday) 1958 This seems to me the best simple treatment of human freedom in all its diversity and interpretations. Adler sets out from 3 basic freedoms, and expands, partially by a dialectic, the number to 9. Basically because this paper is not, and cannot be, an analysis of the concept only two fundamental notions are used.

everyone in society as participants in, and contributors to the common good, well being, coherence, strength, and general beneficence of everyone in that society. Hate propaganda directed against individuals in groups on social or religious grounds offends against, and both in intention and in fact, seeks to destroy those harmonious relationships. It is wholly negative, or anyway, its gravamen is wholly negative; it does not proceed by reasoned argument or founded fact, and if it is pretended, as is happening in Great Britain to give a "scientific" or "opinion" veneer to its invective and directed vilification, then the tone, the measures called for and the veiled purposes are obvious enough. Obvious enough, say, to entrust to judges and juries the determination of the ends being sought and who is being victimized and how. Tolerance in such circumstances is intolerable towards those who practise this form of intolerance. There exists basic norms of internal decency and moral integrity on which societies are founded and sustained; if these are slighted or ignored, then that society fails or by default will founder.

5. Whether the Canadian Charter of Rights and Freedoms will or will not alter the legal position of the provinces in dealing in a civil way with defamation law, or with a possible law of groups in the area of the engendering and communication of hatred against social or religious groups

remains a question. While, no doubt, the Charter would be used in any defence of anyone allegedly infringing such a prohibition, either provincially or federally, either criminally or civilly, the societal view that I have been outlining, has been gaining recognition in western society and has come to be seen as an enhancement of everyone's liberties, as against the atomic anti-social view.[1]

Section 3: Psychological

People raised in and being in comfortable middle class homes -- of whom I am one, but not always -- seem to have only a blunted sense of what racial insult and discriminations do to the self-esteem, aspirations, and modes of life of the targeted individual or groups, and especially to the children. It can be and is, too often devastating; they are treated as less than human, they are dehumanized. They react aggressively in anger, which usually only worsens the situation, frustrates the victim and drives the injury deeper; or supinely, they come to accept their stigmatization, as a fated fact of life, with all the misery and degradation that that entails.

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1 See Roberto Mangaberia Unger, Knowledge and Politics, McMillan Free Press 1976.

Complacency may be the chiefest obstacle to getting anything done.

Or we turn to so-called counter-propaganda as an anodyne. I suppose it has value as far as it goes, but it costs money; it usually is not efficiently or effectively carried out; it reaches too few and mostly the ones not needing it; it may even give some backhanded legitimacy to the thing it would eradicate.

Or we turn to educational programmes, the schools and seminars, public addresses and media resources of the Human Rights Commission. So far so good, but again for many reasons, education has not in this or in other matters been the efficacious force that the Enlightenment expected it to be. Persuasion is, no doubt, the better way; but Prospero, with all his powers, never persuaded Caliban. Whether law is supplementary to education or education to law, both must be resorted to and supported.

In Section 2, on my "Presuppositions", behind this submission, I will attempt a tentative and layman's version of the causes of hate.

Section 4: Legal

There is a maze or labyrinth of other difficulties to be dealt with in the course of this paper. They are largely of a technical legal nature and will be brought up and dealt with as we proceed, including: the questions of the definition and intricate machinery associated with class actions; what disposition there might or should be with respect to damages, general or exemplary, if any; the Cassandra perplexities of a flooding of the courts by such cases; costs, if any; the impact of the Charter of Rights; the use of injunctions, if feasible or sensible; would a new form of civil or tort action aid towards a solution; to what extent would penal sanctions stand up under scrutiny; an expanded re-thought and revised Libel and Slander Act; a wider dimension given to Ontario Human Rights legislation; or possibly a mix of several available forms of action. These are but a few of our now approaching difficulties.

PART III

PRESUPPOSITIONS

Section 1: Freedom and Community

Perhaps it would be just as well to outline as briefly as may be (a thing regrettably not usually done in legal or political papers) a few of the philosophical presuppositions or approaches herein. Such would seem to be only fair to the readers, in their or my own orientation, since in proposing new law and in issues of such profound social implications, the next to beginning places of thought not only demand overt assertion but clarification. It is our ways of seeing the world that are at stake.

1. There are, at least, two schools of interpretation within the democratic tradition today concerning such matters as human rights, essential freedoms or liberties; notions of the good; hence, the better or worse forms of society in which one would desire to live; hence, the role and function of law.

2. The first and prevalent conception argues for the following propositions, among others:

- that freedom is an individualistic thing (the Crusoe concept);
- that in social affairs, self-determination represents the highest value;

- that all or most law (and government) curtails freedom, or infringes on the individual freedom to do as he pleases (Hobbes);
- that law is a primarily coercive or sanctioning notion;
- that the less law the better if liberty is to be preserved;
- that self-preservation, egotistic self-interest, are calculations of private benefit to the downgrading or exclusion of that of others;
- that all life is a form of warfare, and in war the strong prevail.

3. From the point of view of the second school (which is that of this paper) the above freedom appears largely negative and irresponsible; it is a freedom from or in spite of law, not a liberty won under and through law; the second view affirms and rejoices in society, friendship being the spice of life; law and liberty are seen in intention and essence, as mutually supportive, although not always so in fact or practice; that far from being a licence, liberty connotes obligations to others and hence to oneself, and at times, sacrifices; that the "individual" is not an isolate, an "idiot", as the Greeks called him, a self-seeker (not a seeking self), as against the "person" who centres upon and lives in and with others, in an affirmed interdependency. Society is seen not as a sum or

aggregate of individuals, as a sort of mechanism, which is held together by an impersonal rule of law, an externally binding power, a sort of blind chance -- rather, society is an intended unity, where law is a minor but enriching necessity on the way to personal realizations. As a matter of fact, nowadays, human beings and social relations are conceived almost wholly (except for private, family or segregated "club" relations) in terms of power structures of one sort or another; in terms of "having" of independent possessions ("my rights") as opposed to "being" or co-existences and mutually enriching interdependencies and co-operations. If individuals accept the benefits of a society, they must also be prepared to assume the burdens, and become "persons".

And so the following nostrums obtain:

1. There is no freedom without responsibilities; both responsibilities to oneself, and more importantly responsibilities to one's fellow men. This recognition defines maturity, social meaning, and a commonwealth.

2. To put it one way, Chesterton wrote, "The first is this: that the things common to all men are more important than the things peculiar to any men" (Orthodoxy, page 80).

3. That so-called personal "rights" have a social dimension, in that "my rights" are reciprocally and contextually related to "your rights" and, importantly, to our mutual responsibilities and hence that one individual's rights must not destroy another's. Freedom, like equality with which it is intrinsically allied, is an indivisible garment, and both are central ingredients in justice. One right, for instance, "free speech", legally and logically cannot be asserted in such a way as to subvert or inhibit or abort the equality of status of other citizens, especially those who are weak or in a minority.

4. One opinion is not as good as another (I cannot argue this here); there are legitimate or illegitimate modes of speech; that laws could contribute to liberation and safeguard freedom rather than repress it; that one freedom may not rule out another; that the person (not the individual) is the ultimate value (that which the universe serves). Freedom, rights, or justice all contribute values (which are more "rational" than, say, statistics) as components of, or means to, the constitution of a person and he or she is to the heart of their being, social, so that a personal ethic <u>is</u> a social ethic.

Our society does not presently fully recognize or acknowledge these values, precisely as social values, or only most inadequately in "group" terms, and therefore we have

countenanced all sorts of discriminations, biases, superiorities, and this enables us to resist taking steps to make real an equal concern and respect for persons as such. Nor would I use the term "collective" -- that too is a mechanical use, nor even "society", but only the term "communal". Further, I refuse to call the hate stuff "literature" but propaganda. These things are not matters of taste or subjective belief -- degradations never are, they are readily observable injuries to many people out there.

It is the burden of my proposals to counter certain forms of overt degradation. Laws can only go so far in this regard; they may not be able to enter the secret places of the heart; people will think whatever they desire. Insofar as social viciousness and malice take external and explicit expression in certain defined areas of conduct, and certainly in racial ones, where the vilified group or individual by reason of birth, for causes over which one has no control; and in religious belief where one's primal commitments in life stand at stake, some protection in the form of legal support has point and substance. These protected bodies themselves, of course, must also respect the similar biological determinisms and faiths of others.

We may be as critical as we like about ideas; but about people we must be more circumspect -- we cannot ultimately judge the final meanings of another human being.

Section 2: Psychology "On Hate"

While not wishing to turn my presuppositions into mere presumptions, I would attempt a few remarks on hatred and its origins, as over the years and through hard experience and observation, it has gradually been disclosed to me as a layman sees it.

1. The opposite of love is not hate -- it is fear. Hatred comes as a tertiary or derivative passion or emotional reaction from the rejection of love and of the fear of loving. The fear, I am concerned with, takes many forms: of being utterly alone, uncared for, abandoned, disposessed, abused, left in total isolation. If felt deeply enough and for long enough, it rankles into resentment, into hatred against whoever apparently causes the anxiety of insecurity and lostness. It either emerges in a defensive rage of aggression or rebellion against the offender (who is usually innocent, our fear being largely illusory); or into a passive withdrawal or conformity, or a pretended complacency or submission; I think of the too good child.

In the first case, any frustration of the desire for power over the other will only increase the hostility. In the second, the bitterness and desire to hurt will be masked in a repressed revenge. In both cases, normal human relations or communication become difficult and the neglected or ignored one often adopts an anti-social mode of egocentric behaviour.

2. The fear of and for oneself and one's security and the failure of trust, which lies behind and within that fear, is one and the same as the fear of the other. The impersonal other has caused it and that other deserves to be punished, perhaps to be murdered, at least in intention. Self-hatred and hatred of parents and siblings, and finally of other persons generally, are bred on the part of one who feels that he is not wanted or loved, and since it is painful to hate oneself and to be cut off from normal human carings and friendship, one represses and secrets the pain and despair, the guilt and the terror, and more or less pretends to an openess, even an affability, which he or she never really feels. In all this I follow Adler much closer than Freud, and particulary in the profound feelings of inferiority that are involved.

3. Then a strange thing happens. The repressed hatred against the self, ineluctably transforms into a fear, hence a hatred of others; and to exorcize the demon, the anguish, the repressed anger, the venom is projected out upon others, any convenient others, but since a basic courage is also lacking, against those others, who are historically despised and rejected, those whom he believes are most vulnerable socially to assault, verbal or otherwise, with impunity. He looks for and, as our society is presently constituted, easily finds a scapegoat, after which, he begins his rationalizations with a vengence.

4. He or she becomes a member of a cult of power and force, and vaunts the self while despising that self. He or she calls for punitive measures always and in the first instance; fears reprisals, worships power; incites violence, imagines enemies everywhere, proceeds by detours; shares nothing and fosters a basic misanthropy through all the smiles; treats others as objects or instruments, as "its"; feels life to be both too short and of fleeting vanity; forces his way in; seeks to dominate others; is often exhibitionistic to attract attention; is never to blame; nurtures 100 prejudices; is bellicose, thinks all existence is a form of conflict. We could go on and on; and as I said before, there is the dollop of all this in all of us and regretably at the stage of evolution or consciousness that we have generally achieved, it, too

often, is a recipe for success -- it gives drive. We all tend both to fear and admire violence, subtle or not.

5. What then? What can be done about it? Therapy, of course, would help, but those most affected or infected are the least likely to accept it voluntarily -- another fear, another fantasy, another self-rejection. Education? yes, if it began early enough, with sympathy and informed teaching, which is rare. The law? yes, because for such people the law too is fearful, although it may only present another enemy to foil or abuse by cunning or by exploiting its frailities, which may be designed to be benign, but are necessarily interpreted as weaknesses. Still, law fairly administered seems the only inhibitory force that he or she may ultimately bow to; but it would only teach a fear of hatred because of its consequences, not a hatred of fear which he or she already unconsciously has. Only he can go through life without anxiety who is conscious of belonging to the fellowship of man. "Fear not, there is nothing to be afraid of."[1] And in community too there is found the matrix of human freedom, rather than the lonely hate-mongers' freedom -- I am free to say and do

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1 Both Jesus and the Buddha -- but with very different meanings.

what I like, which until now he knows is protected by the law or non-law, or absence of law.

6. Should anyone wish to pursue this theme I would recommend the writings of John Macmurray and particularly the chapters on the child and human growth in the second volume of his Gifford Lectures, "Persons in Relation". Macmurray is the philosopher of friendship and community.

I was going to add to this psychology section a few thoughts on "reason" and practical reason, and rationality in every day life and what it consists in because the emotive of reason is the counterweight to bias, prejudice and hate, but, again, would refer the reader to John Finnis' "Natural Law and Natural Rights" where nine ingredients of what it means to be rational are lucidly set out.

PART IV

EXISTING LEGISLATION

Section 1: Canadian Criminal Code

I shall try to keep this section brief. The subject has been worked over many times by the Cohen Commission in depth, by John McAlpine, in his Report to the British Columbia Government (1981), and in good part, one way or the other, by Professor Tarnopolsky (now Mr. Justice Tarnopolsky of the Supreme Court of Ontario) from a position markedly different from mine.

1. I have spoken about the various covenants, charters and treaties of the United Nations, which basically counsel or require the enactment of criminal sanctions of various kinds. Here I would have it well noted that the world community endorses and has largely carried forward legislation, however applied, consonant with the position taken in this paper.

2. Leaving aside for the moment the law on Sedition and the Hate Sections of the Criminal Code, there are numerous sections having to do with the protection of individuals against intentional violence, namely culpable homicide (S. 205); bodily harm (S. 245); assaults (S. 244 ff.), kidnapping and abduction (S. 247 ff.) together with those

against counselling (S. 22), attempting (S. 24), and conspiring to commit (S. 423) such offences; and from violence or threats of violence which are intended to compel anyone to abstain from doing anything they have a lawful right to do, or to do anything they have a lawful right not to do (S. 281); and also threatening communications of all kinds, including those by telephone and radio (S. 331).

Also, the many sections against "breaches of the peace"; unlawful assembly (S. 64-70) (where proof of a common purpose is necessary but a mere threat to public peace is sufficient if done by three persons); riots (S. 65) (there must be an actual disturbance); causing a disturbance (S.171 a single person is sufficient, must be an actual public disturbance, but no intention); until 1936, unlawful associations; damage to public property (S. 387 and 388).

Then too: defamatory libel (S. 261 to 281) -- written only, many defences; and blasphemous libel (S. 260) -- probably otiose); two sections on spreading of falsehood; false news (S. 177) (knowing it to be false) and false messages (S. 330) -- with its heavy onus on the Crown applying to fact and not to "opinion", where injury or mischief must be caused or is likely to be caused to a public interest; public mischief (S. 177).

None of these sections for one reason or another cover the situation except sometimes in a narrow way or a single aspect and with such qualifications as to render them, by and large, useless in meeting squarely the very pointed issue, namely group defamation until the sections of 1970, Sections 281(1) and (2) were enacted.

Section 2: Seditious Words

One strain of the Civil Rights theory derives from the ancient delict or crime of sedition. Appendix 1 of the Cohen Report details its Star Chamber history, its logical implications and genealogy. Section 60 (1) -- Section 63 of the Criminal Code sets out its present Canadian status and while the historical weight went to discussions on the stirring up of ill-will among the Royal subjects, which could be detrimental to constituted authority, the present law focuses on "force as a means of accomplishing Governmental change within Canada". We need not spend time on it as it clearly falls within federal jurisdiction.

The leading case is Boucher v. The King (1950 99C.C.C.1, 1951 2 D.L.R. 369 with a re-hearing). It was a Jehovah Witness case, wherein Boucher, a Witness, was convicted in the lower courts of seditious libel by the publication in Quebec of a pamphlet entitled "Quebec's burning hatred for

God, Christ and Freedom". He was finally acquitted. Rinfret C.J.C. in a lonely judgment said: "I would not like to leave this Appeal, however without stating that to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might also say, to be invited, but as was said elsewhere, 'There must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation'."

It should not be understood from this court -- the court of last resort in criminal matters in Canada -- that persons subject to Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results that are often inevitable."

The Porter Commission of 1948 in Great Britain rejected any general change in the criminal law of group defamation while deploring the presence of such defamation, stating that seditious libel stands as an ultimate sanction. Nevertheless a few years later in 1965, the British Race Relations Bill came into being proscribing defamation against racial and ethnic groups, substituting for the incitement to violence test of the Sedition Law, an

intention to stir up hatred, which intention was in 1976 deleted.

Section 3: Sections 281 and 282 of the Criminal Code

Let us consider briefly the several sections of the Canadian Criminal Code which ensued upon the Cohen Commission Report.

Section 281 (1) reads: "Everyone who advocates or promotes genocide is guilty of an indictable offence ...", and then defines genocide, sets out the Attorney General's fiat, and finally defines "identifiable group" as "any section of the public distinguished by colour, race, religion or ethnic origin". You will note the absence of an "intention", the advocacy or promotion is enough, nor does the question of "truth" come into issue. Behind the Section lies the United Nation's Convention of December 9th, 1951 which one of the seven Declarations or Covenants which we shall come to in Section 6 of this part.

Section 281 (2)(1) proceeds as follows, "Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, ---". There is no 'fiat', as in 281(2)(2) but proving that a breach of

the peace is "likely" may be a considerable hurdle. The "likely" has caused misgivings. Anyway there are a number of complaints that it is largely unenforceable.

Section 281(2)(2) has presented several problems. It reads: "Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of ...".

The term "wilfully", as interpreted, in the case of Regina v. Buzzanga and Durocher (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), raises the "mens rea", so it is argued, and as I believe, to an impossible level of proof. B'nai Brith's League of Human Rights Brief states that Buzzanga "has effectively shut the door on prosecutions under section 281(2), and that "Crown Attorneys have apparently been reluctant to pursue prosecutions under that section since the case because of difficulties in establishing what was in the accused's mind, and concerns that an unsuccessful prosecution will create a more onerous precedent than the one that the Buzzanga case has already set." The point is well taken; but it was a curious almost theatrical case at best, where the accused besmirched their own cause, cloaking it under the guise of coming from the opposite camp. Can one defame oneself, under the pretext that one's opposition did it? Probably the subsection could stand further clearer testing. Still the onus is very high

indeed. And what of "private conversation", what if they are overheard or meant to be overheard and how to prove the latter? Anyway there are numerous complaints that it is unenforceable.

Finally section 281(2)(3) sets up the four defences, besides the normal ones, and many objections have been taken to, at least, two of them: firstly, subsection 3(b) the "good faith" opinion upon a religious subject. Keegstra on the Holocaust is probably in good faith. And secondly, 3(c) i.e. statements relevant "to any subject of public interest -- the discussion of which was for the public benefit, and if on reasonable grounds believed them to be true". The simple objection must be that every fanatic believes what he says; otherwise he would cease to be a fanatic.

My purpose here is not to scalpel these clauses in the Criminal Code; nor will the issue be pursued beyond stating that they are clearly difficult, if not impossible, to enforce for reasons that have clear relevance to our proposals.

Other Remarks on Other Areas of the Extant Canadian Law

It is interesting to note that the wording of section 1(d) of the Canadian Bill of Rights, which is different in

wording but not in substance to section 2(b) of the Charter, reads, "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following Human Rights of fundamental freedoms, namely ... freedom of speech". And what if there were such discriminations?

Mr. Justice Seaton speaking for the Court of Appeal of British Columbia in Law Society of B.C. v. Attorney General of Canada and Jabour (1981) W.W.R. 159 spoke as follows:

> Saumur v. Quebec City [1953] 2 S.C.R. 299, identifies certain rights, freedom of speech is one of them, that are not matters of a local or private nature in the province and may not be the subject matter of a by-law authorized by the province. This and other cases support the proposition that the provinces cannot legislate in relation to free speech. But they can, when legislating in regard to other matters, limit freedom of speech. Thus free speech is qualified by the laws relating to defamation and by other laws ...

A number of other cases are then cited.

Constitutionally, the gate may be straight, still an opening is there. That which is within or closely analogous to libel and slander law lies unquestionably in provincial jurisdiction, and I would assume in this paper

that the Ontario Human Rights Code is not ultra vires, though one can never be sure. Civil rights legislation would seem by definition to encompass the power to limit, regulate, inhibit, and even proscribe certain forms of speech. In a recent case the provincial jurisdiction over the review and censorship of films etc. was upheld, provided that objective and hence unarbitrary criteria or norms were utilized. In Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983), 41 O. R. (2d) 583, at 589 this was said: "These fundamental freedoms guaranteed in the Charter are not absolute. The Charter recognizes that it is sometimes necessary to restrict freedom of expression to an extent to protect the interest of society". Further, three requirements to meet section 1 of the Charter of Rights were enunciated:

a) any limit placed on the guaranteed freedoms must be shown to be demonstrably justified in a free and democratic society;
b) it must be a reasonable limit; and
c) it must be a limit that is prescribed by law.

In a lengthy letter, to James Renwick, MPP, dated February 7th, 1975, Mr. Justice Frank Callaghan, then Deputy Attorney General of Ontario, said:

> In a recent article assessing the record of Chief Justice Duff on constitutional cases before the

> Supreme Court of Canada, Gerald LeDain, Q.C. adopts Duff's provincial rights approach and argues that, unless the provincial encroachment of freedom of speech is significant (in the sense that it contributes a real danger to parliamentary democracy) then the provincial encroachment is constitutional.

This language resonates with the wording of section 1 of the new Charter of Rights and Freedoms.

Chief Justice Duff in the Alberta Press Bill case[1] spoke on the issue:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v. Commonwealth, "freedom governed by law."

Again, we recall the words of Rinfret C.J.C. in the Boucher v. The King case.

And yet again, the comments made by Heather Sinclair in the Canadian Human Rights Reporter, volume 3, are relevant and pointed:

> One writer has noted that the traditional Canadian justification for free speech, as exemplified by the Alberta Press Bill case, is not the right of the individual to be free from

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1 [1938] S.C.R. 100, [1939] A.C. 117 (P.C.) at 133 (S.C.C.)

> government restriction, the traditional American view, but rather the need for free discussion in a democracy.

Section 4: English Law

The Race Relations Act (1965), having proven singularly unsuccessful in application in that two blacks were the only persons convicted under it, was replaced by an amendment to the Public Order Act 1936, (5a) now section 70 of the Race Relations Act (1976). The wording is:

> 5a(1) A person commits an offence if (a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in a public place or in any public meeting words which are threatening abusive or insulting, in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any race or group in Great Britain by the matter or words in question."

It provides a defense for an accused who did not know the contents.

You will note that it does not provide the civil defences of the Canadian Criminal Code but is benignly vague with respect to what defences it does provide. Neither "deliberate intention" or any "willfulness" appears, that is, it deals with an overt act, tied in with a "likely" consequence, and does not mention "a breach of the peace" as a necessary ingredient. Like the Canadian statute, the

"fiat" of the Attorney General is a pre-condition for prosecution for incitement to racial hatred.

There have been few prosecutions, and one or two bizarre acquittals, while the fiat has been withheld on quite numerous occasions.[1]

Some of the problems are:

- that the source of the propaganda is usually anonymous;
- that a judge was unsympathetic to the law as such;
- that the standard of proving that hatred was likely to be stirred up was too high -- a denial that exposure to hatred, ridicule, or contempt was sufficient;
- that distribution was limited to either one person -- an MP, or to anti-racist organizations only, and not to "the public generally.

The legislation, though of a criminal nature, gives us some helpful guidance in two ways. Firstly, it discloses the analogous, though probably graver, problems of another

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1 "Incitement to Racial Hatred", a briefing paper by Paul Gordon (January, 1982). This paper is on the law of Great Britain.

jurisdiction -- one which has a deep continuities with our own and its, perforce, mode of treatment. Secondly, it seeks to come to terms with racial hate propaganda as such, where the "threatening, abusive or insulting words" were being cloaked in ever more sophisticated forms, as "education" or "jokes".

Section 5: American Law

In American jurisprudence, amidst much pragmatic flux, there seems to be but one right that is considered "natural", or anyway, almost absolute: the First Amendment right of free speech.

We must remember that, unlike Canada, a criminal power functions at both levels of government, Federal and State, and that the 14th Amendment extends the right to liberty through "due process" to state law. In the infamous Collins v. Smith decision (The Skokie Illinois, Swastika case[1], the village ordinance against a Nazi parading), while the Court of Appeals mentioned the Washington Supreme Court decision eleven months earlier in Contreras v. Crown

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1 578 F 2d 1197 (7th cir.) cert. denied 439 U.S. 966 (1978).

Zellerbach[1], which gave a cause of action on a new tort of outrage, nevertheless the criminal sanction in the Skokie case was held to abridge the plaintiff's First Amendment Rights. Hence an acquittal.

This doctrine or dogma, unlike Britain or Canada, is so entrenched in American Constitutional tradition and law that few qualifications are recognized; still in Roth, obscenity, as defined, has been dealt with as exempt of the First Amendment and I would point to further landmark decisions on the issue of "words that wound"[2].

Before doing so, six other salient comments might be made.

1. The circumstances behind the historical coming-to-be of the American Constitution encompass the getting rid of the Stamp Act on newspapers and restrictions of freedom on political speech. The American revolution involved that the bans on free speech in protest of government and press censorship, were intolerable.

2. Presently in all countries with the common law heritage, "free speech does not mean free speech: it means

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1 88 Wash 2d, 735; 565 P 2d 1173 (en banc) 1977.

2 Chaplinsky Case: in 3 Harvard Civil Rights -- Civil Liberties Law Review Vol 17, p.133.

speech hedged in by all the laws against defamation, blasphemy, sedition and so forth: it means freedom governed by law"[1].

The Chaplinski[2] decision of 1942 puts it this way:

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

3. A purpose of the virtually unconditional character of the American notion was to preserve unrestricted discussion of public affairs. Referring to Professor A. Meiklejohn's position that the right of free speech is derived from and required by the principles of self-government, a Yale article of 1979 argues as follows, "Speech that goes beyond the preservation of ideas for public consideration and deliberation need not be permitted, because such speech is not relevant to the

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1 James v. Commonwealth of Australia [1936] A.C. 578.

2 See page 46.

process of deliberative consent and self-government from which the right to speak derives".[1]

4. As the brief or summary of argument on behalf of the Attorney General of Canada, in the Federal Court (Trial Division), in the current appeal in the Western Guard Party case, puts it, "reliance on authorities under the First Amendment to the U.S. Constitution is a dubious and inappropriate source of assistance in the interpretation of the freedom of expression that is provided in Subsection 2(b), of the Charter", and goes on "in textual terms, there is no parallel ...". The American view asserts a virtually absolute freedom on its face, in the sense that "any legislation impinging upon free speech is viewed as being presumptively invalid". We shall further discuss the distinctively different and broader Canadian view later in this part under "The Charter".

5. Still, and despite the fortress protection of the First Amendment as being or as having a sort of primacy over a wide ambit of other rights, three American cases must be mentioned in a report such as this:

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1 "Group Vilification Reconsidered", Yale Law Journal 1979, 308.

a) Schenck v. United States[1], where Mr. Justice Holmes pronounced the "clear and present danger" test, which no longer receives the weight it once had yet remains a test for many civil libertarian organizations. The facts had to do with the accused mailing circulars to draftees denouncing conscription and urging them to assert their rights. He was unanimously convicted. I would remark that the test for hate propaganda is not that of sedition, nor are we to await the maturation of hatred to the point where such a test might be applicable -- that would be somewhat late in the day, just speaking ironically.

b) The Chaplinsky v. New Hampshire 315 U.S. 568 (1942) -- the "fighting words" test and case, which was tied in with the provocation to violence, in that insulting words were spoken to a police officer on a quiet street accusing him of being a racketeer and fascist. The court said that the words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".

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1 Schenck: 1919 249 U.S. 47.

c) In Beauharnois v. Illinois 343 US 250 (1952), the Supreme Court upheld on the narrowest of margins a criminal statute prohibiting the defamation of a racial group. The state penal code provided that it shall be unlawful for any person "... to sell or offer for sale ... or publish ... any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, colour, creed or religion which said publication or exhibition exposes the citizens of any race, colour, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Speaking for a 5-4 court, Mr. Justice Frankfurter stated: "But if an utterance directed at an individual may be the object of criminal sanctions we cannot deny a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State".

Still it must be made clear that this case is presently held in serious doubt in the United States. Its history has been well outlined by Professor Mark MacGuigan (as he then was) in the excellent appendix (the MacGuigan

appendix) of the Cohen report at pages 104 to 112. Illinois repealed the statute in question in 1961; nevertheless the decision remains law, though probably more on the ground of judicial restraint with respect to such State laws reflecting the local conditions as seen by the Assemblies of these states, than on the offence proper.

Without going deeper into the innumerable decisions under this head -- they are as the sands of the sea -- which would itself require a treatise, I shall simply quote a summary statement of the Canadian Human Rights Reporter Volume 3, December the 20th 1982:

> American jurisprudence might also be looked to in interpreting our newly-entrenched Bill of Rights and in particular applying to it hate literature laws. In general courts in the United States have been concerned only with proscribing those utterances which have an immediate tendency to incite violence. Thus we have seen the development of the "clear and present danger" test and the "fighting words" doctrine, for example. As the United States Supreme Court's more recent pronouncements show, mere advocacy of unlawfulness or statements causing injury to reputation, even if untrue, will generally receive constitutional protection because to restrict them would unduly hamper the exchange of ideas and information protected by the First Amendment. That a Canadian court would adopt such a "hands off" policy with regard to free speech is, it is submitted, unlikely, especially in view of section 1 of our Charter, which appears to be a clear invitation to the courts to engage in a "balancing of interests", something the American judges have been loath to do when dealing with the regulation of the communicative impact of speech.

6. Philosophically, the American position seems to me to derive from a Hobbesian, "state of war or nature" viewpoint, wherein freedom from restraint of any kind catches the essence, and only obliquely from John Locke (except for "property rights") and not at all from John Stuart Mill, who is nevertheless often appealed to, if Mill is read with care. Canada follows Mill rather than Hobbes.

Section 6: United Nations

Today most of the nations the world can point to legislation directed against racial and in many cases, religious hatred propaganda, either existing prior to the numerous United Nations' treaties, covenants or conventions, or as a result of them. While the United Nations strictures are not, after signature or ratification, binding upon the signatories and however little practical accord may be given to them, they are a powerful moral incentive, somewhat stimulated by the reportage regimen in effect. It surprises me that they are so well and contentfully worded considering the sheer diversity of views and attitudes represented.

Some nations such as the United States of America have not ratified many of these documents on the basis of national

sovereignty or because the claim is that such rights are already in law.

The main documents and a brief comment thereon includes the following:

(1) The Universal Declaration of Human Rights, December 10th 1948, which guarantees the right to people to freedom from intimidation, harassment and hatred because of their race or ethnic origin. It speaks also of social and economic rights.

(2) A Convention on the Prevention and Punishment of the Crime of Genocide, December 9th 1951 in force of December 1952, signed by Canada November 21st 1949.

(3) The United Nations Treaty on the Elimination of All Forms of Racial Discrimination (1963) states that racism is a punishable offence under law and that "all states shall take immediate legislative and other measures to prosecute and/or outlaw organizations which promote or incite racial discrimination in any form".

(4) The International Convention on the Elimination of All Forms of Racial Discrimination (1965), article 4 states that racist organizations shall be illegal and that the financing of racist activity should be an offence. It

condemns all propaganda and organizations based on theories of racial superiority or attempting to justify or promote racial hatred or discrimination. Over 119 nations have signed this document.

(5) The International Covenant on Civil and Political Rights, 1966, article 19 which states: "that everyone shall have the right to freedom of expression, including 'freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers' ...". But article 19(3) limits this freedom as follows "the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions but these shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others --". This Covenant and its Protocol came into effect on March 23, 1976 and Canada became a party to it and the Optional Protocol on May 16, 1976, taking effect on 19 August, 1976.

(6) The UN Convention on the Elimination of All Forms of Religious Discrimination. This was introduced in 1967.

(7) A Declaration on Race and Racial Prejudice (1975 article 6), this document speaks of the eradication of racism, apartheid, and the use of other measures to effect this end.

Section 7: The Charter of Rights and Freedoms

1. Section 2 of the Charter guarantees fundamental freedoms, including "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

The Constitution Act, 1981, section 52 (1) provides: "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."

Apart from the "notwithstanding clause" section 33 (1), the Charter contains two provisions directly effecting any legislation concerning hate propaganda. Firstly, the 1st section of the Charter reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," so that, effectively two considerations obtain, a) reasonable limits; and b) such as can be demonstrably justified in a free and democratic society. The sort of limitation on freedom of speech being proposed in this paper, I submit, should fall within these parameters. When this is taken with section 27 of the Charter, that is: "This Charter shall be inter-

preted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", our submission seems to gain added strength. I would not consider or advise resort to the "non obstante" clause in the event that any emergent legislation proves, on testing, invalid, largely because I think this section should be used in rights matters most sparingly.

2. Perhaps, taken on their face, all laws, federal or provincial, seeking to deal effectively with hate propaganda are or would be in trouble; but laws are seldom interpreted quite so literally. They contain their own hermeneutics based on precedent, on rationality and on the needs of the community. Certainly one would not anticipate that "entrenchment" would mean retrenchment or a reversion to an abstract American doctrine especially in the context of the wording quoted above.

3. Much that I shall say herein has been taken from the "Summary Argument on Behalf of the Attorney General of Canada", which I advert to elsewhere in this paper, in the John Ross Taylor and Western Guard case now before the Federal Court. The Taylor case in one way or another has been around for years. See Appendix 6 of the Cohen report 1965, a Prohibitory Order of the Postmaster General, prohibiting delivery of all mail directed to or coming from that person, because of the "scurrilous" matter contained

therein. Subsequently, John Ross Taylor (also known as George Morang) and the Western Guard Party, appeared in the first hearing before the Canadian Human Rights Tribunal, with J. Francis Leddy, Sidney N. Lederman, and Rose Volpini sitting, in June 1979, to answer complaints filed under section 13(1) which defines as a discriminatory practice, the telephonic communication of hate messages, in this instance, directed against an alleged international Jewish conspiracy, of a treasonous nature. The Federal Court, in effect, confirmed the Commission Order to desist and held both respondants guilty of contempt, suspended the sentences (jail for Taylor and a fine of $5,000 against the Party), on condition of a discontinuance of the contemned practice. Appeals followed -- that to the Supreme Court of Canada being denied on June 22nd 1981. The Commission sought a second Committal Order in May of 1983, and the matter is presently before the Federal Court, on construction of the Charter in this context.

4. Concerning "reason" and "rationality", especially the meaning of "practical reason", one is again driven to philosophy, like it or not. Simply to assume that one is rational, when the next man is not, as many people, particularly those in official positions are inclined to do, is itself irrational. To be rational is to transcend one's own egotism and subjectivity; to think in objective terms, to place oneself sympathetically "out there" with

the other, emotionally and intellectually. As stated previously, the best recent analysis of rationality has been depicted in 9 points by John Finnis, in chapter 5 on "Natural Law and Natural Rights", although much has been done on the theme elsewhere, but not by positivists (one of my biases).

5. The freedom of expression under 2(b) of the Charter probably remains the same as under section 1(d) of the Canadian Bill of Rights, (see Reyes v. Attorney General of Canada, unreported F.C.T.D. August 4th 1983); and therefore, not at odds with the earlier decisions mentioned in part II of this paper, which recognizes the paradox of freedom, that freedom must not subvert freedom, that freedom of speech must not destroy freedom of association or sociability or a half dozen others; or, in any case, has reasonable limitations.

6. Does our proposed Civil Rights Legislation meet the standards and criteria of free and democratic societies? The several United Nations Conventions previously set out herein, give international cognizance, and more, request determinate action, in this very sphere and on these very grounds. Besides the European Convention on Human Rights, wherein 21 nations are now signatory, offer five separate reasons, including "the protection of the reputation or rights of others", and sets up inhibitions upon so-called

free speech. Indeed, after the Holocaust, the whole world recognizes the validity and urgency of this new human need of restraints upon hate propaganda, our consciousnesses having been slightly raised.

7. British Constitutional Law and our own in continuity with it contain and express an integrity of their own, an informing spirit and élan vital, quite distinct from that of the United States. Historically, they have not evolved along the same parallels. One germinated in a "laissez faire" of language, the other within a sense of the social obligations inscribed on the common tongue. While the First Amendment appears absolute on its face, the courts and the theorists, without compromising it, qualify it, "but it is clear that any qualification on these rights arise by derivation or necessary implication alone".[1] Much of this was supposedly in favour of Mill's exchange and creative expression of ideas, when no "ideas" are being expressed; of intellectual discussion, when no intellect is present; of vigorous and even acrimonious debate contributing to a healthy and informed citizenry, when the very opposite is clearly taking place.

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1 Department of Justice Summary in the Western Guard case, page 21 paragraph 46 and the other cases cited.

The Department of Justice brief gives five examples of the virtually absolute primacy given to "free speech" conception of the First Amendment, as opposed to other significant public and social interests as seen by other societies. Examples "include the invalidation of efforts to control:

1) racially inflamatory conduct and speech;
2) the exhibition of nudity which is clearly visible from public places;
3) a public criticism of the conduct and honesty of a named judge;
4) publication of the name of a rape victim; and
5) offensive conduct or speech which might give rise to an apprehension of public disturbance".

The brief references each authority.

Let us nevertheless be reminded of an earlier page herein, which draws attention to several questioned, but extant decisions containing the more current ideology. See the Beauharnois and Gitlow[2] decisions, and Schenck ("the clear and present danger" tests and its development), and Chaplinsky ("the fighting words" test).

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2 Gitlow v. New York 268 U.S. 652, (1925) a prosecution for criminal anarchy "and speech threatening the Commonwealth".

PART V

POSITIVE PROPOSALS: THE THREE PATHS

Three ways or modes of proceeding present themselves:

1. A common law action in tort, in the tort of discrimination per se; or more expansively, either a common law action given statutory recognition, founded in a tort of discrimination. In the alternative, if there exists no such common law action (see: Bhadauria v. the Board of Governors of the Seneca College of Applied Arts and Technology, [1981] 2 S.C.R. 181), then the creation of an action as has been done in British Columbia (see 1981, Civil Rights Protection Act, Chapter 12), and earlier in 1934 by the Province of Manitoba, but in defamation. Let it be immediately said that the Manitoba Queen's Bench, in Courchene v. Marlboro Hotel Company Ltd. et al 20 D.L.R. (3d), 199), has ruled Section 19 of the Act ultra vires, in that, in essence it deals with criminal libel, a position which has been long predicted. Nevertheless, a legislated action in tort for discrimination or in defamation, if worded adequately, remains a distinct possibility in Ontario.

2. An amendment, and possible addendum to the Libel and Slander Act of Ontario.

3. A mode of redress on the grounds of discrimination or defamation, within and under the Ontario Human Rights Code.

Any one of the three seems feasible. The considerations of choice would involve nice questions not so much of substance, as of procedure:

- as to the wordings and scope in which the civil actions might be cast -- that, in libel and slander being more exquisite than the others;
- as to the forum, whether the hearing would be by way of trial, with the numerous considerations that would entail;
- whether a Hearing Officer or Officers, or a Judge, with or without a Jury, would be the fairer or more accommodating modes;
- whether damages were sought and what remedies were either sought or available and their stringency or comparable efficiencies and effectivenesses taken into account.

A separate and distinct statute although intentionally framed in tort might well be the most exposed to attacks on its validity on constitutional grounds, as trenching upon, or in some way in conflict with, the exclusive heads of power under Section 91 of the British North America Act, or possibly on some interpretation of the Canadian Charter of Rights and Freedoms.

My own preference would be to utilize the vehicle of the Ontario Human Rights Code, expanding and adapting it in a separate section to the causes herein discussed and for reasons that will appear at length hereafter.

I make no formal "recommendations", rather my predilection is in the direction of suggestions.

Section 1: Tort

1. It should be said that a large but still limited group (in the United States, Prosser says up to 25 persons), however hazardly, can presently take self-constituted proceedings in defamation without leave of the court, or official review, without fiat from any Law Officer, with its own legal counsel, claiming damages against an allegedly defaming defendant or group of defendants, and having private carriage of the proceedings throughout, under the ordinary rules of evidence. In theory, Rule 75 of the Supreme Court of Ontario permits this.[1]

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1 Stark et. al. v. Toronto Sun Publishing Corp. et al (High Court of Justice) 42 O.R. (2d) 791; where the class said to the defamed casts too wide and too philosophical or ideological a net, a class action ought not to be permitted.

The law of "Standing" is presently under review by the Law Reform Commission of Ontario, as it has been in many common law jurisdictions, for instance, Australia. However defined, it probably would not affect in substance the suggestions made in this study.

Because I believe the court and costs factors to be so inhibitory in the present procedure and further that "interest" refers to a proprietory or financial interest, tort has not, and would not, be much resorted to by most allegedly defamed plaintiffs.

2. The substance of content of a newly formulated tort -- and it should be precisely termed a "tort" -- is best aimed at discrimination per se, including the specific acts of discrimination presently embodied in the Code. The new British Columbia Civil Rights Protection Act 1981, Chapter 12 speaks of "prohibited act" as meaning, "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

a) hatred or contempt of a person or class of persons, or

b) the superiority or inferiority of a person or class of persons in comparison with another or

> others, on the basis of colour, race, religion, ethnic origin or place of origin."

As the section below "On Words" argues, I would, while not necessarily omitting such words as "promoting", also give emphasis to "exposing". The legislation does not attempt to set up the necessary class procedures, giving definition and direction to this very particular form of tort.

As a matter of fact, the wording of the British Columbia statute seems to me quite inferior to the original McAlpine proposal (see page 78, infra) and, not least, in that the original incorporates the defamatory aspects involved in hate propaganda, and this is both crucial in itself and bolsters the civil element of the evil that is sought to be remedied.

3. The new tort action would be formally constituted as a class action, in loose adaption to the proposals set out in the three great (whatever reservations and misgivings I may have about this work), I repeat, "great" volumes of the Law Reform Commission of Ontario, to which I shall return in Part VI, on "Groups".

4. The class or group would proceed on its own responsibility and take its chances as in any ordinary civil

litigation after probably a preliminary certification, except for the problem of distribution of damages, if any, which lies in the domain of a jury, with authority reposed in the trial judge, who would be given discretionary power to direct it to a "charity" after consultation with a successful plaintiff.

5. This would remove any "outside" interference by the Attorney General or any other governmental executive body.

6. The very special provisions of the kind of class action suit would be spelled out in the legislation itself, such as discoveries, notices, interlocutory motions etc.

7. It would permit injunctions, interlocutory and final, the latter subject to appeal; or declaratory orders, as well as awards.

8. It would encompass "written matter of all kinds" communicated or distributed publicly, and "words publicly spoken".

9. The defamatory matter, the malice or vilification, which would be the gravamen of the case, would be analogous to, but not necessarily identical with, what would be considered defamatory of an individual, but without the diversity of distinctions, qualifications, and desiderata

which distinguishes an action under the Libel and Slander Act.

10. No specific intention would have to be proved, the words would speak for themselves, and their purport would be weighed by the civil standard of evidence on the balance of probabilities. No special instructions to a jury would be necessary, the judgment of ordinary men and women, that of the average fair and reasonable person, in my opinion would suffice, despite the fears expressed by many civil libertarians.

11. The onus to prove the defamation would remain on the plaintiff, who would be faced with the defence of "truth" or even "opinion" which is always difficult to disprove. Incidentally I would reverse this onus in the Human Rights Commission proceedings.

12. It would not be necessary to prove actual violence, or even the immediate or likely threat of civil disarray or public disturbance as an ingredient.

13. Whether the Bhadauria decision would invalidate a tort action or not (I do not think it would, were the Code to continue to stand in its present form, since Bhadauria precisely fell within the extant Code on the question of hiring), the wider implications of that judgment must be

taken into account. I read it, somewhat presumptively, as directing the problems away from tortious relief or quasi-criminal sanctions to the established "elaborate" procedures of the Ontario Human Rights Code, which are not, as yet, elaborate enough. There remains adequate room for a tort proceeding. However, if the Code is expanded, no resort to tort would be either advisable as a separate action based upon the statute, nor, probably would such be necessary. We must go one way or the other and like Martin Buber, I point the way.

14. Finally, a tort of discrimination, in the absence of an altered Code would be well in order. A tort addressed to representations and actions importing injuries (such as deportations, boycotts, castrations, deprivations of legal and moral rights, or defamations, those importing or imputing designated inferiorities or general subhumanity, or stigmatizing certain identifiable groups as pariahs of some kind, or advocating overt denial of equal opportunity in or in access to, or supply of social resources within the Province) -- such a tort, at our present level of social development and our recent experiences of history, is in my opinion, legally necessary and would not preclude or infringe upon legitimate speech -- on the contrary.

Section 2: Libel and Slander

1. Here, the meaning of defamation would have to be to some extent redefined. To begin with, people call themselves names which offend not them, but their compatriots, and a thorny road it would be were the present intricate law (for which one has to be an expert) retained in any recognizable form. I think of the law of "qualified" and "absolute" privilege; of "fair comment", of the role of the jury, of justifications or truth as a defence, of the various intentions involved, of the provisions governing consolidations and the special rules touching them; of "malice" of how "malice" affects the pith and the outcome of the case, particularly in qualified privilege, of the apologies and retractions, of the proof of fact, of innuendo, of the effect of "honest" prejudice, of the circumstances of special damages, of security for costs, of actual damages, the historically honed out categories of various slanders.

And then adapting all this to a class action modality would stretch the fairest ingenuity. It would not be impossible -- nothing man has made cannot, in theory, be unmade -- but why torture a concept when alternatives are available?

2. The present requisite that the libel or slander be "of and concerning the person", (Knupffer v. London Express Newspaper Limited [1944] A.C. 116 (H.L.) aff'g [1943] K.B. 80 (C.A.)), and the onus of proving a lowering of one's esteem or reputation in the community as a proprietory or money matter, tend to delimit its usefulness.

In the Court of Appeal, in the Knupffer case, MacKinnon L. J., said this, "the primary rule of law is that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that they are written or spoken of him". He lays out two exceptions to the primary rule: the first being, "when a class is so small or completely ascertainable that what is said of the class is necessarily said of every member of it ..."; the second arises, "when the words purporting to refer to a class in fact refer to one or more individuals".

In Dowding v. Ochery, [1912] W.A.R. 110, it was held:

> "Where the libel is of a determinate class each member of the class may sue; the size of the class is irrelevant except to the extent that the larger the class, the more difficult it may be to prove that it is in truth a determinate class. Secondly, where the libel is of an indeterminate class, an individual member cannot sue unless he can prove that he, as an individual was aimed at in contradistinction to the other members."

3. Perhaps the whole matter is best put by the Cohen Committee, at page 42:

> the civil law of defamation provides no protection at all against group defamation.
>
> At common law a person, who has been defamed as a member of a group has legal recourse only as an individual, i.e., for recovery he must be able to show that the defamatory words were published and concerning him. The two "group" situations in which plaintiffs in Canada have been successful in so proving have been the case where the reference to a group is merely a cloak for an attack on an easily identifiable individual or the case where the group defamed is a very limited class and identification of the plaintiff is not difficult. Aside from one Quebec case decided under the province's Civil Code where it was held that a group of 75 Jewish families out of a total population of 80,000 were sufficiently ascertainable to be protected against defamation, usually at common Law no group larger than 20 has been considered a sufficiently limited class.
>
> In effect the common law in no case protects groups from defamation; even when it protects small groups it is on the principle that the members have been directly and personally defamed as individuals.

4. Some of the advantages and disadvantages of such an action would be:

a) The action would be clearly "civil" and within provincial jurisdiction.

b) It would necessarily involve "appeals" on the full range of the other beneficial, but costly, Civil Court procedures.

c) It would be primarily directed to reputation and not to feelings, although it would go to group defamation, which does to a degree involve feelings, rather than group defamation in the strict sense.

d) It involves "actual" harm, usually of a monetary kind. Some personal general damages must exist, otherwise the famous $1.00 obtains.

e) The alleged defamation must be proved by the plaintiff firstly, to be one of fact not of opinion and secondly, to be false and to have caused actual harm.

5. A re-thought Libel and Slander Act would, therefore, in my opinion, require a wholly new part in order to address the problems of "groups" and in the context of the law. (See Part VI of this paper and the next section herein on the Third Option or Human Rights Code expansion, where much would be applicable herein; but particular care would have to be exercised in determining the group, far more than in the relatively loose designations of the Third Option.) To make the point, the full Certification procedures of the Law Reform recommendations would obtain (as it would probably but not necessarily in Option 1), which would in itself involve cost and inhibitory factors. An assessment of damages would present very

special difficulties, whereas in Option 1 damages may or may not be a sought remedy -- although I would, on the whole, be favourable in tort to such a claim inclusive of exemplary damages, whereas a no-damages policy would be advisable for Option 3.

Section 3: The Ontario Human Rights Code and Commission (The Third Option)

1. It is suggested that the most efficacious basic approach to the question at issue, might well be an amendment to, and an expansion of, the terms and apparatus of the present Ontario Human Rights Code and Commission. (Possibly with a first proposal or tort action, in tandem, or as a supplementary mode. These last remarks are tentative only and inserted only because I was asked to look at all possibilities).

Back in 1977 in the Symons Report (Life Together: A Report on Human Rights in Ontario), it was requested that a group concept be clearly included in the complaints section (Section 31) rather than, or along with, the present joinder concept. If the Commission route were seen to be acceptable, it would, of course, have to be introduced.

2. The present preamble of the Ontario Human Rights Code, in broad and promising language, after honouring the United Nations Universal Declaration of Human Rights, envisages and encompasses the objectives that have been sought in our submissions. It is to recognize concretely in more than words, the "dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province".

3. Presently the Code limits itself to various specific discriminations: equal treatment both with respect to services and facilities, contract, tenancy premises, wages, employment discriminations by trade unions, employers and occupational associations, etc. Any new part would have to delimit the area of discriminations basically to race and religion and similar terms, as against the wide wordings of other parts of the Code.

4. Within the umbrella provisions of the Human Rights Code, the province has legitimate and valid constitutional grounds for creating a civil remedy for persons and groups of persons who suffer and are presently exposed to hatred,

contempt and various discriminations, which take their rise from such contempts. The Code covers both the "civil" and "rights", racial and religious, operative within the province. Again I would refer the reader to Part II herein touching difficulties and the reasons and justifications set out therein.

5. It goes without saying at this point, that I have been influenced by, and generally agree with, the position and argument set out in the Cohen Report, particularly the McAlpine proposals, and would have the government carefully examine and review these proposals.

6. The Human Rights Commission approach appeals not only because it most clearly falls within provincial jurisdiction, but because its tenor and temper (perhaps) best accords with the nature of the evil to be remedied, which is not so much physical blows, but rather the subtler psychic and spiritual ones, which are no less traumatic because relatively intangible. It seeks to heal wounds not by punitive and vindictive sanctions, but by persuasions and conciliations. In the Symons Report of 1970, at page 18, after stating:

> If there is not freedom for the community to develop in harmony and peace, then there cannot be secure freedom for the individual who lives within it. The individual's right to freedom must be exercised in the context of his or her responsibility to the community of which he or she is a part. The individual's quest for

> freedom cannot fully succeed if it is accompanied by an indifference or hostility to the freedom of others. Freedom requires a reasonable balance between the rights of the individual and the rights of society ... But human rights legislation is concerned less with punishment than with attempting to win the offender to the community consensus. Consequently, it is conciliatory in its thrust. Only when conciliation fails are Boards of Inquiry invoked which may order any party who has contravened the Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

In some cases, this procedure will suffice, without éclat or cost to those involved. In the more obdurate cases, remedies already lie within the Act for certain specific discriminations. To meet our submissions, the Act would have to be expanded or amended in two directions; firstly, to bring in the group aspect, and secondly, to introduce a section or sections or a distinctly separate part (the better way) to define and determine the "hate" concept. We shall return to this latter position.

7. As the Law Reform Commission puts it at page 217 Volume 1 on Class Actions, footnote 22, referring to the Bhadauria decision, "Laskin C.J. Chief Justice of Canada, cited as one of the reasons for denying a civil cause of action based upon a breach of the Ontario Human Rights Code the fact that the Code contains its own investigatory and adjudicatory procedure for dealing with violations of the Code".

Of course, it goes almost without saying that the Legislature could pass completely separate legislation either as supplemental, or in furtherance of, the Code provisions, or as a distinct tort.

Except for the group and hate propaganda per se concepts, the machinery is already there: a complaints procedure which allows presently two or more persons to be dealt with together; the investigation to try to effect settlements. If there is no settlement, the Commission may request the Minister to appoint a Board of Inquiry or, alternatively a procedure for reconsideration under Section 36; the Inquiry Hearing and its provisions and powers; an appeal from the decision or Order of the Board of Inquiry to the Divisional Court; a prosecutorial procedure for certain infringements and obstructions, under the fiat of the Attorney General. See also the elaborate procedural steps in the Canada Human Rights Act.

8. The writer knows of no way in which, without invoking criminal procedure or police powers of arrest which would be unconstitutional, the Commission or anyone else could enter preemptively, or "on the spot" contend with or control the dissemination of hate propaganda, and even then it would present grave questions of preemptive free speech. The hate-monger may ply his trade, except where he is already under a Cease and Desist Order or an injunction.

9. Perhaps there should be in Ontario a Bill of Rights, as there is in Saskatchewan, but then again, the Charter probably suffices. Or, perhaps a "Bill of Wrongs," such as the wrong of racial and religious discrimination, but this would be, and become, a somewhat lengthy list. Still, everyone knows almost instinctively what injustice is -- few what justice is.[1]

10. Numerous other considerations would apply to a revised Ontario Human Rights Code:

The phrase "or class of persons" would be added to the Complaints and Initiatory Section and wherever otherwise pertinent, as in the Saskatchewan Human Rights Code, or the phrase "a group of individuals" in the Canadian Human Rights Act.

We will discuss the problem of group designation or "certification" in "Class Actions and Wording", Part VI.

11. "Cease and Desist" Orders might be specifically used since injunctions are peculiar to the courts. Since such orders are generally recognized in a wide range of pro-

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1 Edmond Cahn, The Sense of Injustice Indiana University Press, 1949, also 1964.

vincial legislation, my assumption is that they would be valid here.

12. Provision for injunction proceedings before the courts might be made to give particular teeth to the order. The present Western Guard case will determine to some extent the efficacy of such a proceeding.

13. The section on trivial, frivolous or vexatious or made in bad faith complaints (Section 33 1 B) and the dispositions of costs in that context (Section 40 (6) a) would be retained, while the cost section would require to be expanded to include a discretionary award on an exemplary basis to the vilified complainant. I do not suggest awards of damages, either general or punitive at this time, as the route chosen here does not lie in the courts and although in a sense "private" is under governmental auspices.

14. Possibly in hatred cases, the fiat of the responsible Minister should be sought after the complaint is made and before the Board of Inquiry step, in order to prevent abuse of process and because these matters are of salient public interest and import. Also, the Attorney General should be able to intervene in the proceedings by the presence of a participating counsel and by providing, if requested, open hearing advice.

I think of this in the climate or context of two cases which have caused me some misgivings as to the merits, the public cost, and the elaborateness of the hearing itself, and the evidence utilized. The cases include one in British Columbia, The Ukrainian Professional and Business Association of Vancouver v. William Konyk, operating Winnipeg Garlic Sausage Company Limited (unreported, B.C. Human Rights Commission, 1982; the Appeal, unreported, British Columbia B.C.S.C. 1983); and the other case being the matter of a complaint by Barry Singer against W.N. Ivasyk and Pennywise Foods Ltd., a decision in 1976 initially quashed by the Court of Queen's Bench in Saskatchewan in [1977] 6 W.W.R. 694 on evidentiary grounds, and restored by the Saskatchewan Court of Appeal [1978] 5 W.W.R. 499.

Both had to do with names; the former, a restaurant and food concession named "Hunky Bill's"; the latter, a restaurant called "Sambo's Pepper Pot". In the former case the charges, after long travail were dismissed by the Commission, which spoke in terms of an objective or reasonable person test, as opposed to a merely subjective test regarding those feelings reactive to the sign.

15. Section 12 of the Code re "notices, signs ... and other similar representations" have been considerably re-worked in the 1981 Code but remain confined within the

designated heads of Part 1 of the Act. With some fortitude may I refer to the wording proposed by John McAlpine at page 61 of his report (1981) arising out of the Ku Klux Klan emergence in British Columbia. The proposed section reads as follows:

> No person or persons acting in concert shall communicate any statement, or disseminate or display any notice, a sign, a symbol, emblem, or other representation before the public,
>
> (a) that is likely to expose a person or a class of persons to hatred, contempt or discrimination, or that ridicules, belittles or otherwise affronts the dignity of a person or class of persons by reason of their race, religion, colour, ancestry or place or origin; or
>
> (b) that is based upon the idea of racial superiority, and is likely to expose a person or class of persons to hatred, contempt or discrimination, or that ridicules, belittles or otherwise affronts the dignity of a person or class of persons.

This would follow upon the present Section 12 (1). Section 12 (2) etc. would be deleted since the proviso that the previous section shall not interfere with freedom of expression or opinion would have the effect of rendering the Section nugatory, and besides, the Charter of Rights and Freedoms would make it unnecessary, and the above would be inserted as Section 12 (2).

Secondly, the adversion to "superiority" is directly in line with what the United Nations called for. It may be

better to use the word "supremacy" since this would avoid pseudo-scientific defences or arguments on biological or anthropological grounds. It would turn from pretexts to actual power relations.

16. We should not neglect a range of other ulterior, yet crucial problems of implementation. We are under a regimen of restraint in government and finances; and government costs for administration are no small consideration. If the extant Human Rights Commission were deemed the preferable route, it would, in my opinion, meet any such objections admirably. Firstly, it would save the courts much time and incalculable effort, especially for the judges who would be obliged to go through a radical retraining to adapt themselves to the complexities of a new class action regime, however the Law Reform Commission proposals were reformulated. Secondly, the apparatus is already basically in place and easily amenable to this non-onerous extension. No major, or any, staff recruitment would be required since the complaint would, as usual, come in through interested or offended groups by way of either representatives carrying their evidence with them, so that no or little "investigations" would be necessary, nor added investigators needed. Nor would added Commissioners need to be hired. Thirdly, on the statistics and comments of the Class Action Report, there would not be what Ministers of Justice cry halloo about

when any new legal move is mooted, that is, "a flood of litigation". I shall return to this dire theme in Part VI under "Group Actions". Fourthly, it would be relatively inexpensive for the parties and expeditious. Without the prior "investigations" to contend with, the initial steps of the Tribunal or Board of Inquiry would proceed apace, nor would considerations of the size of the class, nor damages, nor costs, nor lofty legal competence be, except perhaps in very few cases, trying or weighty considerations. Fifthly, speed would be of the essence, and unlike the courts, could be more readily accommodated to. Also the speed element could be quickened by requiring that the name of the printer, publisher or advertiser be placed on every poster, leaflet or brochure distributed in the province.

17. If prosecutorial clauses were added to the legislation in cases which were so notorious, or vicious on the evidence that it was thought that an action under quasi-criminal providence should be carried forward by the Crown, then, it should be used but rarely, and only in extreme cases. Such provisions in the present Code are never used.

18. A relatively simple, informal, class action procedure has been worked out under the regulations of the Saskatchewan Human Rights Code and these should be looked at. Nevertheless these provisions would require a tighten-

ing up, and a more definitive treatment of the multiple sub-considerations and steps in that Code, informed and guided by whatever would be adaptable and applicable from the Ontario Class Action Study.

19. Being a civil, administrative, proceeding, evidence would be submitted "on the balance of probabilities", not as in the Criminal Code. Certain onuses would have to be reversed; for example, the proof of matters of fact would have to be borne by the asserter of the fact, as would assertions of opinion. The Tribunal, which must have three sitting officials for such hearings, would also be better able in the relatively nonformal setting to weigh the gravity of the propaganda in arriving at a wise decision or order. No proof of "intent" would be invoked. The fact that the statement was on reasonable or other grounds believed to be true or of public interest, or that there was an imminent fear of violence or civil insurrection or breach of the peace would no longer be a defence. The test of exposing others to hatred should be an objective one and the norm should be that of a reasonable man or woman, and further, I assume that the majority of Commissioners are even more reasonable than that.

20. Varieties of redress might be considered; for instance, in France, the publication of an apology or the

decision itself in the newspaper designated by the complainant at the respondent's expense; the payment of some compensation into a charitable organization to be agreed upon by the parties, or if this is impossible, designated by the Commissioners; an address to the Legislature to pronounce its condemnation of the practice; a requirement of the respondent to write to the victims if not too numerous; a withdrawal of the remarks; or as has been said, a Cease and Desist Order -- all measured by the seriousness of the matter, or what might be the most efficacious way to terminate the cancer.

21. Provision should be made for filing the decision, order or declaration of the Tribunal with a Superior Court, probably the Divisional Court, where, following the logic of the Canadian Human Rights Act, Section 14, it would ipso facto (or possibly on a review of that court) become an order of that court, and enforceable in the normal way upon its breach or its being ignored.

PART 6

CLASS ACTIONS AND WORDING

Section 1: On Group Actions

1. I do not pretend to have exhaustively worked over, or absorbed, the almost 1,000 pages of highly annotated analysis that the Law Reform Commission of Ontario has generously donated to this demanding and deserving new area of the law -- that would take months, even were one able to do so. However, on first looking a little into this prosaic Homer, I was taken aback by the absence of the usual in-depth analysis in the case of class or group defamation, except in a passing, largely, descriptive way. Yet on second thought (or practically any thought) not so; the considerations in its recommendations, which went into its draft bill covering security law, shareholders claims, mass accidents, consumer and trade practices and environmental law, do not and would not apply without considerable adaptation to the civil rights area of defamation (see volume 1 page 277, also 213-226).

2. The reasons given by the commission run, "The bar to such actions lies not so much in the procedural difficulties of class actions, but in the fact that there is no right of action for discrimination per se at common law"

(221). Previously on the other hand, at page 219, speaking of the American experience in class suits, the text reads:

> "Generally speaking, civil rights class actions have received particularly liberal treatment from the courts. This may be for two reasons: first, courts recognize that discrimination is by its very nature ordinarily a public or "class" wrong, rather than a private wrong, and class actions are perceived as an effective means of redressing inequalities in the treatment of minorities; and secondly, civil rights class actions are assumed to be easily manageable because they typically seek injunctive and declaratory relief. Class actions seeking only equitable remedies generally have not been viewed as burdensome or difficult to manage."

3. Let us look at the range of matters to be considered in such actions: various certification tests on the merits, on cost-benefit considerations, simply to get the action underway; numerosity requirements; "superiority" tests (volume 2, p. 374); the great variety of notices etc.; inclusions and rights of exclusions of members of the class and the terms thereof, the "communality" features and the "typicality" ones (not difficult probably in defamation suits); affidavits; an intervention of the Attorney General; evidence; discoveries; interlocutory motions; limitation periods; appeals, and many more, and within each is to be found a host of principle and policy considerations. No doubt without Solomanic ingenuity, such a panoply could be adapted to give rights to defamation suits. Still, it would require some stripping

down and revision and a somewhat simpler, yet just, procedure than those proposed by the Commission.

4. The three main benefits of such an action would be judicial economy, easier access to justice, and behaviour modification of the defendant (Ibid., p. 117 ff.); all have critical relevance to the area in which we are interested. What would need to be done would be to insert special rules for class proceedings within the Human Rights Code (as Saskatchewan has done and McAlpine has explored, sifted, and recommended)[1], but carefully resurveyed in Ontario by reference to the wisdom gained from the Law Reform proposals. I do not consider it my job to attempt this major task, either in substance or in detail; there are many able people in the Ministry of the Attorney General eager and anxious to do so.

5. As to the "flood of litigation" argument, the Commission (Ibid., p. 117, 182, 192 and tables) states that the benefits would outweigh the burdens and "that in most cases the benefits in terms of judicial economy -- would indeed contribute to reducing the courts workload" and "would be sufficiently substantial to outweigh any additional burdens on the judiciary and therefore to justify

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1 See Regulations appended to Saskatchewan Human Rights Code.

the expense of providing any additional resources necessary to process these actions." (Ibid., p. 192). At page 211 the report goes on: "for example, it does not appear that class actions have "flooded" the courts or have resulted in a generalized pattern of "legalized blackmail"; nor are the majority of class actions "unmanageable", in terms of class size or demands on court time". Nevertheless, I believe that "special" judges should or would have to be assigned to class actions for reasons of the sort of "expertise" that would be needed to expedite them, at least, initially.

6. The Cohen Report at page 59 has this to say:

> There is no longer any valid legal reason for continuing to exclude "groups" from the protection of the law. The present state of the rules with respect to groups is merely a reflection of the fact that our law developed in a more individualistic age. But the 20th century has been marked by a growing sense of social inter-dependence, of the importance of group activity, and legal policy has already reflected this change of climate in many sectors. Most of the modern states have already expanded their legal systems to provide for group intimidation and defamation.

8. Two further points, firstly, Rule 75 of the present Supreme Court of Ontario Rules of Practice does allow for a restrictive form of class action if the individuals are numerous, but not too numerous and if they have the "same interest". This would apply to defamation as to other

suits. Although the rule requires that a representative defendant be appointed or authorized by the court to defend the action on behalf of the defendant class, a representative plaintiff need not be so designated, and in effect, is self-appointed with all the defects and difficulties this entails. In this, and in a hundred other ways, the need for reform in this area has become patent, whatever adjustments are made for actions framed in defamation.

Secondly, mention should be made of the Quebec case of Ortenberg and Plamondon, (Rapports Judiciaires de Québec 1915, 385) where a tort action in group defamation was recognized and damages awarded. The plaintiff was directly referred to in a lecture and was, out of 75 Jewish families then residing in Quebec City, clearly singled out and suffered affront. Mr. Justice Cross said:

> I cannot agree that the respondent's utterances amount merely to a non-actionable denunciation of controversion of a race, or religion at large. They were that and, as regards to the appellant, they were more. They were an invitation and incitement to a boycott of the handful of Jewish traders in the City of Quebec.
>
> I, however, consider that it would be a mistake to test the appellant's right of recovery in his action by rules applicable only to actions of defamation or libel. The declaration in this case discloses a wider cause of action, namely that of an action in damages for words maliciously spoken, such a cause of action as I find described in modern treatise as follows:
>
> Encyclopaedia of the Laws of England citing

Royal Baking Powder Company v. Wright Crosley and Company.*

But then subsequently the judge makes reference to the case applying Article 1053 of the Civil Code. If the latter reference was the "ratio" of the case, then it impacts not at all on the common law.

Section 2: On Words

In politics, it is what you do not say that too often counts; in law, or in drafting statutory law in any case, although the ideological intent is often hidden even from its devisors, nevertheless, one seeks as positive and clear an enunciation as possible -- positive even when saying no -- and as simple as the subject matter permits.

Two strands or viewpoints or approaches predominate in the area of hate law, which intersect and, to be adequate, intertwine: group intimidation and group defamation. The former connotes and recalls to some degree a criminal element, the insurrectional or violent, the older law of sedition, breaches of the peace and such like offences as

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* Wood-Reuton, tit. 2nd, Words Causing Damage, the Second Edition 828.

has been previously outlined, which are sanctioned on an individual basis, leaving aside "causing a disturbance" (Section 171 of the Criminal Code). The latter, i.e. group defamation, has precisely as "group", been afforded little or no protection at law, either in tort or under the Libel and Slander Act or in the criminal law of defamatory libel. A number of individuals similarly defined may sue under Rule 75, or by defendants' consolidation under the Libel and Slander Act (section 12). Section 281 of the Criminal Code sought, it appears unsuccessfully, to rectify this and yet may with criminal sanctions. Manitoba sought to provide a solution in tort, but that attempt lies under a dark cloud.

The two languages differ. The former speaks of "incitements to acts of violence", threats, causing bodily harm, harassments and intimidations. The latter speaks, to and of, "discriminations"; of justifying or permitting specific discriminations, advocating certain superiorities, slandering, libelling, belittling, ridiculing, insulting, vilifying, holding up individuals or groups to derision or obloquy or contempt. It discountenances individuals or associations whose aims or activities are against the idea of understanding among peoples as in West Germany; or whoever abuses or misuses speech in deprecating the dignity and equal status of identifiable groups; or promotes or fosters or affronts by publicly disseminating such viciousness.

Many statutes encompass both dimensions, but these are usually from unitary states[1], or are framed federally with criminal sanctions in mind; whereas an exquisite care to avoid any trespass on the criminal power must be exercised where a province under a Constitution such as ours seeks to redress the specifically civil wrong.

"Malice" language is sometimes used in both areas and I would tend to avoid it; nor would such a term as "wilfully" which caused so much soul and semantic searching in the Buzzanga case. Nor should the term "likelihood" be used -- the "likelihood of inciting or promoting hatred" -- since it tends to confuse and muddle the issue; and diverts the judge or tribunal from the main point. Also, there are better words than "scurrilous" as found in Section 164 of the Criminal Code referring to Mailing of Obscene Matter.

McAlpine's wording has already been brought forward.[1] His first ground, "actions or communications that expose a person or class of persons to hatred, contempt or discrimination" may well be sufficient. Perhaps a better wording might be found for his second clause "or that ridicules, belittles or otherwise affronts". Though I do

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1 See Page 78.

not quarrel with it, in that it pertains directly to defamation, still, such a formulation as "insults, threats or subjects to ridicule (or possibly derision or obloquy)" might be construed as more precise, though as Aristotle said a long time ago, precision goes with the subject matter. We are dealing with the dignity of human beings, not amoebas, and to obtuse minds nothing will be adequate.

A combination of several phraseologies in separate subsections might be feasible, or they may be fused into a single clause along with a "superiority" or "racial supremacy" clause. I suggest "exposes" -- it has an external objective sense -- and "identifiable group" limits the scope and gives added definition to what we are talking about. If such a phrase as "concern and respect for the dignity ..., or equal dignity" of each human being was used, it would be to the betterment of any legislation.

In this matter of vagueness or precision of language, the Department of Justice brief makes the following just remarks at page 15:

> It is further submitted that the language of the Statute is of the standard of precision that is appropriate to the nature of the abuse of freedom of expression, the flexibility of human speech, and the public interest in inhibiting group vilification that the legislation seeks to protect. The application of the statutory standards is in the hands of a tribunal and subject to the supervision of the courts. The language

> is of common understanding and is in terms that have been applied without apparent difficulty or ambiguity of the law of defamation.
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> ... there are limits in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those who tend on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Whatever terminology may be thought best, it should be broad or narrow enough to catch the "Holocaust" situation, the denial of which is currently a veiled way to attack the Jewish people. To deny the Holocaust, or to claim that it is an invention to obtain compensation fraudulently, seems to me a double obscenity; it is, in effect, to condone the very extermination of a people, and at the same time calumniates them for denouncing it. In September 1979, the West German Federal Supreme Court in a civil injunction proceeding ruled that to deny the historical fact of the Holocaust was to attack the human dignity of Jewish people and that, "any attempt to justify, to gloss over or to dispute" the facts of the camps or the extermination, was tantamount to contempt for the dead, the survivors, and all intended victims.

Two final points:

1. We need not avoid the word "incitement" which is pretty well neutral between usages; it may be, as well, incitement to discriminate, as incitement to cause a breach of the peace; and incitement to hatred hangs between the two. It would be a perfectly legitimate term in our context.

2. The class, classes, or identifiable groups sought to be protected under the legislation would be limited on the basis of colour, race, religion, ethnic origin or place of origin, as in the British Columbia Act.

PART VII

FINAL REMARKS

I know that this has been a "different" report or submission ranging over many subjects and much material usually ignored or avoided in more purely legal thinking; over conceptions of freedom, the rule of law and the centrality of equality, over a living doctrine of community as against a crass individualism as being the crux of the problem, over a psychological thesis on the roots of hatred, over dozens of doctrinal and technical legal problems, but the assignment would be totally deficient and useless without an orientation in greater depth than what normally satisfies specializations or convention. It would not otherwise have encompassed or focused the diverse considerations that go into the understanding (and all understanding presupposes the social) of what is involved in hate propaganda.

For instance, our notion of freedom and what we mean by an individual's freedom, its being either within or outside the social context, is crucial to an approach to the problems, never mind its solution. In short, the subject matter elicits the treatment. This does not mean that, say, a rejection of the psychology would invalidate the conclusion. It does mean, however, that the adoption of one notion of freedom i.e. as licence, would and does, by definition, more or less, eviscerate from the very begin-

ning, whatever may be submitted in terms of legal or institutional measures of cure or control.

To put the matter a trifle dramatically: in another day, not beyond memory, a sovereign was totally self-determining, by divine right he could do no wrong; he could pretty well do whatever he desired without consulting his subjects or anyone else and without any regard to what they thought or what harms he inflicted upon them. He was "free". That day, except in about one-half of the modern world, is gone; but the autonomous, atomic individual today pretends to replace him. In a sense, every person is a king or queen; but not in that sense, rather in the sense of an equal concern and respect. From an atomic, we have moved to the molecular society and hopefully not as a mere collectivity or mass, but rather as training in and a preparation for community. The law is but a vehicle to transport us there, to a sense of an intrinsic interdependence and human solidarity.

Would or does law -- a civil law directed to the inhibition and control of group defamation help us do so? Certainly law will not and cannot stamp out human hate, or even externalized hatred, which advocates injurious actions against individuals or groups on religious or racial lines. Still, it would publically stigmatize it for what it is and it is ultimately a desire for the death

of the other. Legislation would lend a sense of support from the community to those who are its targets and, at least, modify, indeed, substantially lessen, the inception and spread of the cancer.

Anyone with any sense knows that you cannot legislate love, except perhaps, we should remember that the prime Christian commandment or law (and the legal-moral precepts of other civilizations) is that we love God and that that love is demonstrated in our relations with our neighbours. And I would argue that the law, in the absence in a pluralistic society of any other focal point of reference and authority, can and does set norms for behaviour, which are, by and large, efficacious.

When we were children growing up in a seemingly more innocent world than the present, we used to chant: "sticks and stones may break my bones, but names will never hurt me." With a little added knowledge of pyschology and the experience of a great deal of history we have sorely learned that just the opposite is the case. Sticks and stones may in circumstances mean very little but words may lacerate a human being. As Yeats sang sadly: there are words that will break your heart. Nor must we forget that certain groups of people living peacefully among us and carrying the burdens of society as gallantly as most of us, have for centuries been victimized by western and

other societies and that we encounter here, in our country and province, now, residues and more than residues, and a recall of that so-called civilized savagery. We hopefully here, now, have advanced beyond such barbarisms on the physical and speculative levels, why not on that of the spirit? It is a crass prejudice in construction of law to hold, as so many even cultivated people seem to do, that law ought not or cannot touch the spirit. We are not Kantians.

At a time when the whole international community has lifted into consciousness, and into law, this previously largely ignored area of human relations, we, too are called to participate, to come to terms and address the issue squarely. Mr. Justice Tallis in a recent decision of the Saskatchewan Court of Appeal in Glendinning v. Scowby et al (as yet unreported) has this to say:

> In my opinion, this question cannot be answered without reference to the institutional setting of the Commission and Board of Inquiry constituted thereunder. In more recent times, there has been a marked shift in emphasis to human rights, not only at the provincial and national level but also at the international level. As a starting point, I would make passing reference to the "International Covenant of Civil and Political Rights and the Optional Protocol to the International Covenant", which was adopted by the unanimous assembly of 16 December 1966.

And at page 11 he states that:

> In my opinion, the Code, when looked at as a

> whole reflects the public's growing interest in human rights.

And yet in conversations, and briefs, and in our press, we encounter numerous and not unintelligent resistences.

Some say it is simply not necessary, that there exists no clear and immediate danger; or, if we are not to wait upon crisis conditions, that it has been and is being sufficiently contained without the interferences or coercions of the law; some say it would be futile; some, that it would be counter-productive; still others, that the means being considered are misconceived and that education or counter-campaigns would better suffice. Well, I disagree, as this whole document has consistently argued, and on, at least, as strong and good grounds (no, better ones -- given the vision).

There are those who hold that only in a change of heart on the part of individuals separately lies the key to racism, (and half or maybe all of the ills of mankind), and that out of such "conversions" the structural changes in time would necessarily rise. On the other hand, some contend (and I am one of them) that unconscious, partially non-intentional and impersonal prejudices are historically rooted and built into many of our modes of behaviour and

our institutions, excluding in effect, large numbers of our fellow citizens from full participation in the life and goods of society. Here, a change in structure (law) would help bring about, re-enforce or cooperate with a change of heart. They go together: hard hearts seem often to go with hard heads, and soft hearts with soft ones; but then, too, we encounter hard hearts with soft heads. What we need are soft hearts with hard heads, if this is to become a more human world. We cannot wait for changes of heart -- usually they take time and often much pain, and generally the law has a wonderful effect on the head.